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No. 92-971

In The
Supreme Court of the United States
October Term, 1992

WINSTON J. PERRON,

Petitioner

versus

BELL MAINTENANCE AND FABRICATORS, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT AND REPLY TO OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

**Certiorari should be granted when a United States Court of Appeals has disregarded the plain language of an Act of Congress in "an important question of federal law which has not been, but should be, settled by this [Supreme] Court."**

Rule 10.1 of the Supreme Court Rules provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." In addition, the rule enumerates three instances in which the Court will consider a petition for writ of certiorari; however, this non-exclusive listing merely indicates "the character of reasons that will be considered," and is "neither controlling nor fully measuring

the Court's discretion."

Respondent in its opposition brief contends that this Court shall not grant certiorari simply because two conflicting United States Court of Appeals' decisions do not exist. As previously stated, conflicting circuit decisions is not the sole reason for considering a petition for writ of certiorari. Rule 10.1(c) sets out the criteria allowing this Court to review the Fifth Circuit's decision on this important question of federal law which has never been addressed by this Court, but should be. Moreover, the Fifth Circuit's interpretation of the LHWCA is contrary to its plain language, and thus gives this Court an additional reason for granting certiorari.

While Petitioner and Respondent both

agree that this matter involves the application of the LHWCA, Petitioner disagrees with Respondent and the Fifth Circuit that the judicially created borrowed servant doctrine should be extended to Bell. The Fifth Circuit's decision is not consistent with existing jurisprudence. It extends the existing jurisprudence to bounds that exceed the statutory language of the LHWCA. Bell contends that this matter is "episodic" and will have no impact beyond this case; yet it suggests that this Court allow the lower courts to develop this area prior to the exercise of any review. Rule 10 does not prohibit review of a new issue, and unless this court decides this issue, further misinterpretation is likely to result from the lower courts' development of this area

of the law. Petitioner submits that the issue of extending judicial immunity to third parties, such as Respondent, will arise beyond this case as long as oil contractors like Gulf continue to subcontract.

In addition, prior denials of certiorari of the borrowed servant doctrine do not prevent this Court from granting certiorari in this instance. In a related matter, Perron v. Gulf Oil Corporation, 893 F.2d 344 (5th Cir. 1989), this Court decided against the granting of certiorari to review the application of the borrowed servant doctrine as between nominal and borrowing employers. Perron v. Gulf Oil Corp., ____ U.S. ____, 110 S.Ct. 3273, 111 L.Ed.2d 782 (1990). The matter before this Court today concerns the application of the

borrowed servant doctrine as between two different nominal employers, neither being a borrowing employer of the other. Not only is this application of the borrowed servant doctrine different from the matter previously brought before this Court, but it is in direct conflict with the statutory language of the LHWCA. Thus, this petition for writ of certiorari is not a petition to re-review the issue in Perron v. Gulf Oil Corp.

**It is against public policy to escape the liabilities of doing business, yet retain all the benefits.**

Bell would like this Court to believe that it had no control over Lee because he was a borrowed employee of Gulf. Even if Lee did perform work for Gulf and Gulf

received power to terminate Lee, Bell was still Lee's employer. Bell admits in its opposition brief that Lee was a payroll employee of Bell. *See:* Respondent's Appendix B-4. Bell was also in a position to terminate Lee. It was not Lee who negotiated with Gulf to provide his services; Bell did the contracting with Gulf. Had Lee been Gulf's actual employee, Gulf would not have needed to do business with Bell.

Being liable for the acts of employees is a cost of doing business. It is normally a small cost in comparison to the amount of money that is made as a result of employing workers. Respondent is contending that it is not responsible for the torts of Lee because it released all control of Lee to Gulf, yet Respondent is

allowed to retain all the benefits and money associated with providing Gulf with Lee.

Petitioner resents the Respondent's suggestion that it is forcing definitions on the LHWCA provisions. Petitioner is merely utilizing the definitions found in §902, which apply to the entire LHWCA as indicated in the first line of §902. The proper meaning of the LHWCA language in §933, "persons in the same employ" is determined by reading the statutory language in conjunction with the statutory definitions provided in the act of Congress. Thus, "persons in the same employ" means persons employed by the same employer. In our case "persons in the same employ" would include other persons employed by Danos & Curole, Petitioner's

employer. Petitioner did not work for the Respondent nor did Respondent's employee, Lee, work for Danos & Curole. Neither Perron nor Lee were co-employees of the other.

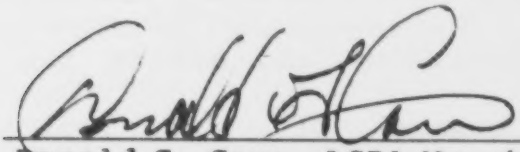
## CONCLUSION

Respondent wishes this Court to go beyond the statutory language and statutory definitions and affirm the lower courts' extension of the judicially created borrowed servant doctrine to third parties. While this *res nova* case is not in conflict with other court of appeals' decisions, it is contrary to the plain language of a congressional statute, therefore requiring review of this federal question. In addition, public policy requires review of this decision that allows Respondent to escape the liabilities, yet retain all the benefits of doing business. Furthermore, the recent amount of litigation over this judicial doctrine in the Fifth Circuit indicates a need for resolution by this Court. For the foregoing reasons,

Certiorari should be granted.

Respectfully submitted:

CAVE & McKAY



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## CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by placing a copy of same in the United States mails, postage prepaid and properly addressed to:

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Baton Rouge, Louisiana, this 25 day of January, 1993.

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